

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:03CR3056-1
	)	
Plaintiff,	)	
	)	<b>MEMORANDUM</b>
vs.	)	<b>AND ORDER</b>
	)	
ANGEL ABARCA SANDOVAL,	)	
	)	
Defendant.	)	

This matter is before the court on remand from the United States Court of Appeals for the Eighth Circuit. Pursuant to the Court of Appeals' mandate, Magistrate Judge Piester has conducted an evidentiary hearing on the defendant's claim that he is entitled to the benefit of the prison mailbox rule, and has determined that the defendant effectively filed an application for a certificate of appealability in this court on September 20, 2006. *See* memorandum and order entered on August 6, 2007 (filing 144). A copy of the application appears as Exhibit A to filing 140.

Although the Court of Appeals' mandate does not expressly direct this court to make a determination on the merits of the defendant's application, it is assumed that the Court of Appeals would want this court to act on the application after finding that the defendant is entitled to the benefit of the prison mailbox rule respecting its filing. This memorandum and order is entered based on that assumption.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or

wrong” in order to meet the standard contained in § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant’s underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

For the reasons set forth in the court’s memorandum and order on initial review, entered on July 31, 2006 (filing 122), the undersigned concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). The defendant’s application for a certificate of appealability is therefore denied on the merits.

Accordingly,

IT IS ORDERED that:

1. That a certificate of appealability shall not issue in this case; and
2. The clerk of the court shall transmit a copy of this memorandum and order, together with a copy of Judge Piester’s memorandum and order entered on August 6, 2007 (filing 144), to the United States Court of Appeals for the Eighth Circuit.

August 14, 2007.

BY THE COURT:

s/ *Richard G. Kopf*  
United States District Judge